

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000023-001 DT

10/21/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

STATE OF ARIZONA

GARY L SHUPE

v.

JOHN FLETCHER ABT (001)

JEFFERY MEHRENS

PHX CITY MUNICIPAL COURT  
REMAND DESK-LCA-CCC  
STATE BAR OF ARIZONA  
111 W MONROE  
SUITE 1800  
PHOENIX AZ 85003-1742

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #6093921; 20029011834

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO;  
2) DUI W/BAC OF .08 OR MORE

DOB: 12/07/63

DOC: 04/07/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement and the court has considered and reviewed the record of the proceedings from the lower court, exhibits made of record and the memoranda submitted.

In the case at hand, Appellant, John Fletcher Abt, was cited for violation of A.R.S. §28-1381(A)(1) - driving under the influence- and two counts of A.R.S. §28-729(1) – unsafe lane change. An attorney, Whitney Sorrell, was in Appellant’s vehicle when Appellant was pulled over by Officer Monson. Upon speaking with Appellant, the officer detected the odor of alcohol and noticed that Appellant’s speech was slurred. When the officer asked if Appellant had been drinking, Mr. Sorrell, also with slurred speech, interrupted and told Appellant not to answer. At this point Mr. Sorrell declared, “I’m [Appellant’s] attorney. I’ll be answering all questions on his behalf.”<sup>1</sup> The officers had to order the pair out of the vehicle, for Mr. Sorrell told Appellant not to say or do anything. Once out of the vehicle, Mr. Sorrell began to shout at Appellant, demanding that Appellant not do or say anything under any circumstances. The officer’s supervisor, Sergeant Wyckoff, had Mr. Sorrell moved about 30 feet away from the investigation of Appellant. After Appellant ignored the officer’s request that he submit to field sobriety tests, Appellant was arrested, handcuffed, and placed in a patrol car. Appellant made no request to speak to Mr. Sorrell at this point. Appellant was transferred to a DUI van where he was given a phone and a phone book so that he could contact an attorney, presumably a sober attorney. Appellant was given several opportunities and ample time to contact an attorney, but did not do so, casting aside the phone book. Appellant’s blood was drawn pursuant to a search warrant and he was charged with several counts of DUI.

On May 20, 2002, Appellant filed a Motion to Dismiss with Prejudice, and petitioned the court for a pretrial hearing on the issue of whether Appellant was denied his right to counsel in violation of the U.S. Constitution, the Arizona Constitution, and the Arizona Rules of Criminal Procedure. On October 14, 2002, the trial court denied Appellant’s Motion to Dismiss with Prejudice. On December 30, 2002, Appellant was found guilty of DUI. Appellant now brings the matter before this court.

The issue is whether the trial court abused its discretion by denying Appellant’s Motion to Dismiss with Prejudice. I find that the trial judge did not abuse his discretion. At no time did Appellant request to speak to Mr. Sorrell or to any other an attorney. Upon being given the opportunity to contact an attorney, Appellant refused to do so, ignoring the officer’s offers to let Appellant use a City cell phone and a phone book, which had been opened to the attorney section. A person is always entitled to the assistance of an attorney whether in custody or not,<sup>2</sup> so long as the exercise of that right does not hinder an ongoing investigation.<sup>3</sup> Nothing in the

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<sup>1</sup> *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (App. 1996) (the right to counsel is a personal right and it may only be invoked by the defendant); also see *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir.1979), and *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975).

<sup>2</sup> *State v. Juarez*, 161 Ariz. 76, 79, 775 P.2d 1140, 1143 (1989).

<sup>3</sup> *Id.* at 80, 775 P.2d at 1144.

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record indicates that the officers interfered with Appellant's right to counsel. To the contrary, Appellant was given several opportunities and sufficient time to contact an attorney. Appellant, by way of his conduct, refused to contact an attorney. Moreover, Appellant had a right to consult privately with his attorney,<sup>4</sup> but he never asked for such a consultation.

The decision whether to grant a motion to dismiss is within the sound discretion of the trial court, which will not be disturbed absent an abuse of discretion.<sup>5</sup> I find no abuse of discretion by the trial court, for substantial competent evidence and sufficient Arizona law support the judge's decision.

IT IS THEREFORE ORDERED affirming the decision of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix Municipal Court for all further, if any, and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

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JUDICIAL OFFICER OF THE SUPERIOR COURT

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<sup>4</sup> *Municipal Court of City of Phoenix In and For Maricopa County v. Waldron*, 157 Ariz. 90, 754 P.2d 1365 (App. 1988).

<sup>5</sup> *State v. Rodriguez*, 205 Ariz. 392, 71 P.3d 919, 403 Ariz. Adv. Rep. 18 (App. 2003); *State v. Pecard*, 196 Ariz. 371, 998 P.2d 453 (App.1999); *State v. Rosengren*, 199 Ariz. 112, 14 P.3d 303, 334 Ariz. Adv. Rep. 16 (App. 2000).